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Peterson v. Hewlett-Packard: Exposing Title VII Inconsistencies in Its Protection of Employees from Workplace Harassment

INTRODUCTION

> Dawn Murray teaches biology and biotechnology at Oceanside High School in San Diego. . . . [I]n 1993, when co-workers learned that Murray is a lesbian, she became the target of vicious anti-gay remarks, rumors, and insults. And school officials failed to promote Murray to student activities director—though she was the top candidate. Someone with her "lifestyle," a school official objected, "shouldn't be that close to the kids." . . . Obscene graffiti was repeatedly painted outside her classroom. When she complained about the harassment, school officials failed to investigate and threatened her with disciplinary action if she persisted.[1]

> George Eighmey worked as an attorney for an Illinois law firm. When the senior partner discovered Eighmey was gay, he was fired. After moving to Oregon, Eighmey was offered a partnership with a new law firm. . . . Then [the Illinois firm] asked his former employers if they would hire Eighmey back if he returned. . . . [Eighmey] then told them the story of being fired for being gay. The Oregon law firm rescinded its offer of a partnership, saying "Our clients wouldn't accept a gay attorney and we'll lose business if we hire you."[2]

To some, the Ninth Circuit Court of Appeals' decision in

1. DOCUMENTING DISCRIMINATION: A SPECIAL REPORT FROM THE HUMAN RIGHTS CAMPAIGN FEATURING CASES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION IN AMERICA'S WORKPLACES 41 (2001) [hereinafter DOCUMENTING DISCRIMINATION], *available at* http://www.hrc.org/worknet (on file with the North Carolina Law Review).

2. *Id.* at 42.

Peterson v. Hewlett-Packard Co.[3] may be the result of a judicial skirmish in what Justice Scalia has referred to as the "culture war," highlighting judicial conflict between secular and religious concerns.[4] In its opinion, the Ninth Circuit declined to affirm the plaintiff's allegations of Title VII[5] religious discrimination. Peterson's claim challenged Hewlett-Packard's refusal to accommodate his condemnation of his gay and lesbian co-workers, asserting that his actions constituted a religious mandate.[6] Beyond the apparent political and cultural conflicts the case exposed, however, it serves the broader function of advancing the judicial and academic discourse relating to Title VII of the Civil Rights Act of 1964[7] and its application in cases of workplace harassment.

This Recent Development argues that, although the court's holding in *Peterson* is laudable, the opinion underscores some inconsistencies in Title VII jurisprudence pertaining to workplace harassment.[8] Accordingly, this Recent Development articulates two distinct levels of incongruence that the case exposes. First, because Title VII fails to protect explicitly gay and lesbian employees,[9] those gay employees who face harassment on the basis of sexual orientation are unable to assert their own claims of discrimination under Title VII, though the court recognizes the ability of their employers to

3. 358 F.3d 599 (9th Cir. 2004).

4. *See* Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (declaring the majority decision to overrule *Bowers v. Hardwick*, 478 U.S. 186 (1986), a decided move taking sides in what he describes as the "culture war").

5. 42 U.S.C. § 2000e-2 (2000).

6. *Peterson*, 358 F.3d at 602.

7. 42 U.S.C. § 2000e.

8. Title VII is applied in two broadly defined circumstances. The first covers the commission of discrimination on the basis of its named categories of status, which is characterized either by disparate treatment or a disparate impact on the employee of that status. The second covers workplace harassment or hostile work environment theory, which includes either the commission of harassing conduct or complicity by an employer allowing such conduct. *See infra* notes 37–45 and accompanying text. This Recent Development primarily addresses the functioning of the latter harassment theory of Title VII protection.

9. It is worth noting that the author in many ways subscribes to the prevailing notion explicated in the social science literature and conversations within the lesbian, gay, bisexual, transgender, intersex, and queer communities that see gender and sexuality as beyond the gay/straight binary most often articulated in broader culture. Nonetheless, for pragmatic and strategic reasons, the articulation of this issue is most effectively accomplished using that binary language, given the parlance of the legal community and the current posture of efforts at legal reform within that community. Therefore, the language of this piece follows that binary language, referring to gay and lesbian people, as opposed to the broader spectrum of sexual identities, though those may be included in any legal attempts to prohibit discrimination on the basis of sexual orientation and should be considered in broader reform strategies.

remedy such harassment. These employees are therefore at the mercy of their employers to avoid such harassment. Second, *Peterson* indicates that under the doctrine of religious harassment stemming from Title VII's protection from religiously based discrimination, proselytizing by religious employees could be subject to greater scrutiny than other forms of harassment.

To illuminate these inconsistencies, this Recent Development focuses on the silent but salient figures in this suit: the gay employees at Hewlett-Packard. It explores the possible Title VII harassment claims such employees would have in order to more ably articulate the inconsistencies in Title VII. It shows that on the facts of *Peterson*, such gay employees could have a viable claim against Hewlett-Packard for religiously based harassment, but would have no claim under the same circumstances if a co-worker made homophobic comments that were secular in origin.

The significance of these inconsistencies reaches beyond a mere exercise in statutory interpretation. Consideration of this case is not simply intended to confront a particular failure of statutory and jurisprudential logic within Title VII but also to bear on a very real and important exploration of power and inequity within the employment relationship in general. Title VII offers a distinctly unique remedy to employees who suffer harassment in the workplace.[10] Its existence, therefore, suggests an acknowledgment that employees working in an environment where harassment based on invidious bigotry is tolerated and allowed is unacceptable.[11] Nevertheless, gay and lesbian employees do not have protection from the very real and prevalent discrimination and harassment many face on the basis of their sexual orientation.

Indeed, gay and lesbian employees subject to such harassment are faced with two equally problematic options: either endure the harassment and its likely emotional, psychological, and physical damages,[12] or quit the job and face the resulting economic and

10. *See, e.g.*, Harris v. Forklift Sys., 510 U.S. 17, 21 (1993) (affirming a Title VII sexual harassment claim); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66–67 (1986) (holding that Title VII's protection from discrimination on the basis of sex encompasses sexual harassment resulting in a hostile work environment for the employee); Daniels v. Essex Group, 937 F.2d 1264, 1266–67 (7th Cir. 1991) (affirming plaintiff's claim of racial harassment when he suffered constant racist epithets, death threats, racist graffiti, and the hanging of a black man in effigy at his workplace); Goldberg v. City of Philadelphia, No. Civ. A. 91-7575, 1994 WL 313030 (E.D. Pa. 1994) (finding actionable religious harassment when employee suffered constant and violent anti-Semitic epithets).

11. *Id.*

12. In his article on the problems of workplace harassment, David Yamada cited the

personal damage.[13] By showing the logical outcome suggested by an alteration of *Peterson*'s facts, this Recent Development suggests that the concentration of Title VII jurisprudence on the actions of an outside party, and not the impact on the injured employee, result in moving away from the goal of eradicating such damage. This consequence demands, therefore, a deeper analysis and critique of the operation and limitations of Title VII.

I. *PETERSON V. HEWLETT-PACKARD*[14]

The precipitous event in *Peterson* occurred when Hewlett-Packard management instituted a program to promote tolerance within their workplace through the development of a workplace diversity campaign.[15] As part of the campaign, the company displayed five different "diversity posters" depicting photographs of various employees accompanied by the captions "Black," "Blonde," "Old," "Gay," or "Hispanic."[16] In a second series of posters, the five employees were depicted in a photograph together, with the caption: "Diversity is Our Strength."[17]

Despite the best efforts of Hewlett-Packard, long-time employee Richard Peterson responded to the campaign with less tolerance than the company had hoped. Peterson felt a spiritual mandate to respond to the campaign with a condemnation of gay people as well as Hewlett-Packard's support of its gay employees.[18] In the words of the court, "Peterson describes himself as a 'devout Christian,' who believes that homosexual activities violate the commandments contained in the Bible and that he has a duty 'to expose evil when confronted with sin.' "[19] In response to his mandate, Peterson posted

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severe emotional impact such hostility has on the employees who are its victims. *See* David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 483 (2000). This type of emotional (and sometimes physical) violence in the workplace has been found to cause stress, depression, low self-esteem, and even Post Traumatic Stress Disorder. *Id.*

13. North Carolina, for example, is like most states, in offering a bleak job market to those who are compelled to leave their jobs. *See, e.g.*, ELIZABETH JORDAN, THE STATE OF WORKING NORTH CAROLINA 1–2 (2004) (showing increasing unemployment, high percentages of those in part-time jobs desiring full-time work, and an increasing wage gap), *available at* http://www.ncjustice.org/btc/2004pubs/swnc04.pdf (on file with the North Carolina Law Review).

14. 358 F.3d 599 (9th Cir. 2004).

15. *Id.* at 601.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

large copies of scripture passages in his cubicle which he believed suggest a condemnation of gay people, including passages from Isaiah 3:9 and Leviticus 20:13.[20] Peterson's supervisors removed his posters after a determination that they were in violation of Hewlett-Packard's harassment policy, which stated that "[a]ny comments or conduct relating to a person's race, gender, religion, disability, age, sexual orientation, or ethnic background that fail to respect the dignity and feeling [sic] of the individual are unacceptable."[21]

During several meetings with Hewlett-Packard managers, Peterson insisted that he was compelled to post the scripture passages in hopes that the gay and lesbian employees at Hewlett-Packard would "read the passages, repent, and be saved."[22] Peterson also asserted that the diversity campaign was "an initiative to 'target' heterosexual and fundamentalist Christian employees at Hewlett-Packard, in general, and him in particular."[23] Peterson conveyed to his managers that he would only cease to post the scripture passages if Hewlett-Packard removed the diversity campaign poster featuring a gay employee.[24] Hewlett-Packard managers refused.[25] After numerous meetings between Peterson and Hewlett-Packard managers, the company was unable to find a solution to the impasse, and Peterson was discharged.[26] He filed suit against Hewlett-Packard claiming religious discrimination in violation of Title VII of the Civil Rights Act of 1964.[27] The Ninth Circuit affirmed the district court's finding of summary judgment in the Title VII claim, on a de novo review.[28]

Peterson advanced his Title VII claim under two different theories: disparate treatment relative to other employees who were not in the targeted class (in this case, non-religious employees); and

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20. *Id.* at 601–02. The verses on Peterson's posters read, "[t]he shew of their countenance doth witness against them; and they declare their sin as Sodom, they hide it not. Woe unto their soul! For they have rewarded evil unto themselves," *id.* at 601 (citing *Isaiah* 3:9), and "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination; they shall surely be put to death; their blood shall be put upon them," *id.* at 601–02 (citing *Leviticus* 20:13). *But see John* 15:12 (New International Version) ("My command is this: Love each other as I have loved you.").

21. *Peterson*, 358 F.3d at 602.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* Peterson also alleged violations of state law. *Id.*

28. *Id.* at 602, 608.

Hewlett-Packard's failure to accommodate his religious practices.[29] The court dispensed of the disparate treatment claim, holding that Peterson failed to show that he was treated any differently than other employees because of his religion, finding instead that he was discharged as a result of his violation of the company's harassment policy and for his insubordination upon management's request that he remove the scripture passages.[30]

On Peterson's accommodation theory, the court assumed arguendo that Peterson's posting of the scripture passages was required by his religious beliefs.[31] The court analyzed the legitimacy of the two accommodations requested by Peterson: for Hewlett-Packard to allow him to post the scriptures, or for Hewlett-Packard to abandon its diversity campaign.[32] Under Title VII jurisprudence, if these accommodations impose an undue burden on the employer, then they will not withstand a Title VII challenge.[33] Comporting with several previous cases,[34] the court determined that allowing Peterson to post the scripture passages would pose an undue burden on Hewlett-Packard, holding that "an employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his co-workers or deprive them of contractual or other statutory rights."[35] The court also concluded that Peterson's second requested accommodation would have created an undue burden on Hewlett-Packard by imposing upon its right to promote diversity and tolerance among its employees.[36]

Although the court's opinion is a straightforward application of Title VII jurisprudence, when separately situated among the relevant line of cases, an important tension is revealed. A brief synthesis of Title VII with emphasis on its pertinence to religion and sexual

29. *Id.* at 603.

30. *Id.* at 603–05.

31. *Id.* at 606. The court made this assumption "with considerable reservations, however, because we seriously doubt that the doctrines to which Peterson professes allegiance compel any employee to engage in either expressive or physical activity designed to hurt or harass one's fellow employees." *Id.*

32. *Id.* at 606–07.

33. *See, e.g.*, Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (finding that to allow an employee to have Saturdays off for his observation of the Sabbath would force the employer to impose unequal treatment as to other employees, constituting an undue burden on the employer).

34. *See id.* at 81; Opuku-Boateng v. California, 95 F.3d 1461, 1468 (9th Cir. 1996).

35. *Peterson*, 358 F.3d at 607.

36. *Id.* at 608 ("These values and good business practices are appropriately promoted by Hewlett-Packard's workplace diversity program. To require Hewlett-Packard to exclude homosexuals from its voluntarily adopted program would create an undue hardship for the company.").

orientation, when explored in conjunction with the facts of this case, clearly exposes this particular tension and its ramifications.

II. TITLE VII: AN OVERVIEW

Title VII has developed a complex jurisprudence despite the brevity of its statutory language. As such, its application can be characterized as pertaining to two categorically distinct circumstances. The first covers discrimination resulting in either explicitly disparate treatment or disparate impact to an employee based on an enumerated protected status.[37] The second includes the endurance of either employer harassment based on an employee's membership in a Title VII protected class or employer complicity in such harassment resulting in a hostile work environment for the employee.[38] Title VII's protection from discrimination on the basis of religion also affirmatively requires employers to reasonably accommodate its employees' religious practices.[39] The statute specifies, however, that a claim against an employer for failure to accommodate a religious practice is subject to the employer's defense that the accommodation requested would pose an undue burden on the employer.[40] As noted above, Peterson brought his unsuccessful Title VII claims against Hewlett-Packard under the disparate impact and failure to accommodate theories.

Beyond its articulated holding, however, the facts of *Peterson* also implicate potentially significant ramifications for Title VII claims based on the hostile work environment theory of harassment,[41] and it is this theory of Title VII recovery with which this Recent Development is principally concerned. This claim is most commonly associated with protection from sexual harassment stemming from Title VII's prohibition of discrimination on the basis of sex, but it is applicable to all of Title VII's enumerated groups of employees

37. *See* THOMAS R. HAGGARD, UNDERSTANDING EMPLOYMENT DISCRIMINATION 59 (2001).

38. *See id.* at 118–22.

39. 42 U.S.C. § 2000e(j) (2000). The duty is imposed via the statute's definition of religion, which reads:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Id.

40. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

41. *Peterson*, 358 F.3d at 607.

protected by the statute.[42] As such, successful claims of harassment on the basis of religion have been litigated applying the analysis employed in sexual harassment claims.[43] Within this jurisprudential scheme, an employer can be held liable for either quid pro quo harassment (requiring the performance or nonperformance of some religious activity in exchange for favorable working conditions)[44] or for overt status-based harassment that creates a hostile work environment for the employee.[45] Harassment that creates a hostile work environment for an employee is the more common type of harassment claim, and that claim is analyzed here.

Harassment on the basis of religion is somewhat unique vis-a-vis the other Title VII protected classes. Courts have predictably recognized harassment of employees on the basis of their religion.[46] In addition, however, federal courts have articulated that the analysis of hostile work environment harassment theoretically applies to cases brought by employees claiming religious discrimination because of their employers' refusal to halt harassing proselytizing in the workplace.[47] Although *Peterson*'s facts did not require a determination of the issue of religious harassment, its language is nonetheless significant with regard to religious harassment claims. When determining the extent to which an accommodation would pose an undue burden on an employer, courts have recognized employers' potential liability for retaliatory religious harassment claims brought by employees on the receiving end of such proselytizing.[48] The two leading cases to address this issue are *Wilson v. U.S. West Communications*[49] and *Chalmers v. Tulon Co. of Richmond*.[50] In *Wilson*, the plaintiff filed a Title VII claim after she was discharged for refusing to remove from her clothing an anti-

42. *See* MICHAEL WOLF ET AL., RELIGION IN THE WORKPLACE: A COMPREHENSIVE GUIDE TO LEGAL RIGHTS AND RESPONSIBILITIES 55 (1998).

43. *Id.* at 53.

44. *See* Blalock v. Metals Trades, 775 F.2d 703, 704–06 (6th Cir. 1985) (permitting an employee who was fired after refusing to submit to the authority of a self-proclaimed "apostle" who had influence over the employee's managers to recover under Title VII).

45. *See* Weiss v. United States, 595 F. Supp. 1050, 1056 (E.D. Va. 1984) (finding that a Jewish employee's supervisor was aware of discriminatory treatment and made no attempt to stop it).

46. *See id.*

47. *See* Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1021 (4th Cir. 1996); Wilson v. U.S. West Comm., 58 F.3d 1337, 1339–41 (8th Cir. 1995).

48. *See Chalmers*, 101 F.3d at 1021; *Wilson*, 58 F.3d at 1339.

49. 58 F.3d 1337.

50. 101 F.3d 1012.

abortion button depicting a photograph of a fetus.[51] The button caused serious disruption at her workplace and caused other employees to file grievances for religious harassment.[52] Although Wilson's supervisors repeatedly requested that she remove the button or comply with alternative accommodations, she refused, stating that she was compelled to wear it as a "living witness" to her religiously based opposition to abortion.[53] As a result of her noncompliance with her employer's requests, Wilson was ultimately discharged.[54] In finding for U.S. West, the court not only determined that U.S. West had offered Wilson a reasonable accommodation but also clearly articulated that "Title VII does not require an employer to allow an employee to impose his religious views on others. The employer is only required to reasonably accommodate an employee's religious views."[55]

In *Chalmers*,[56] the Fourth Circuit was faced with similar facts when the plaintiff was discharged after mailing letters to co-workers imploring them to repent and chastising them for their sins.[57] Chalmers was subsequently terminated. Her employer explained that the letters had a "negative impact on working relationships, disrupted the workplace, and inappropriately invaded employee privacy."[58] In *Chalmers*, the court explicitly indicated the important tension in such a case: "If Tulon had the power to authorize Chalmers to write such letters, and if Tulon had granted Chalmers' request to write the letters, the company would subject itself to possible suits . . . claiming that Chalmers' conduct violated their religious freedoms or constituted religious harassment."[59] This type of tension was also evident in *Peterson*.[60] The court in *Peterson* recognized that if Hewlett-Packard had allowed Peterson to keep the scripture passages, they could have been susceptible to suit under a religious harassment theory by other employees.[61]

Discrimination on the basis of sexual orientation, on the other

51. *Wilson*, 58 F.3d at 1338–40.
52. *Id.* at 1339.
53. *Id.*
54. *Id.* at 1339–40.
55. *Id.*
56. Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1014–17 (4th Cir. 1996).
57. *Id.* at 1015–16.
58. *Id.* at 1017.
59. *Id.* at 1021.
60. *See* Peterson v. Hewlett-Packard Co., 358 F.3d 599, 607 (9th Cir. 2004).
61. *See id.*

hand, is not explicitly prohibited under Title VII.[62] Nevertheless, gay and lesbian employees have been able to assert claims of harassment or a hostile work environment citing discrimination on the basis of sex in some cases.[63] The Supreme Court recognized such a claim of sexual harassment between people of the same sex in *Oncale v. Sundowner Offshore Services Inc.*,[64] by allowing a claim of sexual harassment by a man who had been violently sexually harassed by his male co-workers.[65] Although the circumstances of his claim bore distinct links to homophobic language and violence, the Court was explicit that his claim would be allowed only as a claim for discrimination on the basis of sex.[66] The Court in *Oncale* suggested that same-sex sexual harassment could be actionable in two basic categories. The first would include circumstances with evidence that the harasser was gay, and the second would include instances in which the harasser was motivated by general hostility to the presence of people of the same sex in the workplace.[67] The Court had also previously determined that a sexual harassment claim could exist if the employee was harassed for not complying with socialized gender expectations ("sex stereotyping").[68] Ultimately the Court held that same-sex sexual harassment should be analyzed within the context in which it allegedly occurs, suggesting that "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships."[69]

Given the facts of *Oncale*, it seemed that the Court's holding would offer greater leverage for gay and lesbian employees to bring sexual harassment claims when they are harassed in ways that relate to their sexual orientation. However, the response at the federal appellate level has been mixed at best. The Third Circuit in *Bibby v.*

62. *See* 42 U.S.C. § 2000e-2 (2000).

63. *See, e.g.*, Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 79 (1998) (concluding that Title VII covers same-sex harassment claims); Rene v. MGM Grand Hotel Inc., 305 F.3d 1061, 1063–64 (9th Cir. 2002) (holding that a gay plaintiff had successfully stated a cause of action under Title VII when he proved that his co-workers engaged in inappropriate conduct of a sexual nature, and stating that a plaintiff's sexual orientation need not enter the Title VII inquiry).

64. *Oncale*, 523 U.S. at 75.

65. *Id.* at 76–79.

66. *Id.* at 81–82.

67. *See id.* at 80–81.

68. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 255–58 (1989) (finding, in the context of a Title VII sexual discrimination claim, that sex stereotyping played a role in denying partnership to a female manager of an accounting firm).

69. *Oncale*, 523 U.S. at 82.

Philadelphia Coca-Cola Bottling Company[70] explicitly rejected the sexual harassment claim of a Coca-Cola employee who had been physically assaulted and harassed by a co-worker using homophobic epithets.[71] The court concluded that because the behavior had been motivated by Bibby's sexual orientation, and not his gender, he had no valid Title VII claim.[72] In *Rene v. MGM Grand Hotel*,[73] however, the Ninth Circuit offered greater leeway to gay and lesbian employees hoping to bring sexual harassment claims. Citing *Oncale*, the court held that Medina Rene, an effeminate gay man who was repeatedly grabbed and assaulted sexually and endured constant homophobic epithets from his coworkers, did have a viable sexual harassment claim.[74] However, the court reiterated that Rene's claim was for harassment and discrimination on the basis of sex, and not for discrimination on the basis of sexual orientation.[75]

Despite the hope that *Oncale* engendered among advocates of gay and lesbian rights,[76] both *Bibby* and *Rene* confirmed subsequent skepticism regarding the limited scope of *Oncale*'s holding.[77] Without either broader judicial language subsuming sexual orientation under protection from discrimination on the basis of sex or an explicit legislative amendment to Title VII to include discrimination on the basis of sexual orientation, gay and lesbian employees continue to be limited in their possible Title VII harassment claims. Despite any ambiguity in Title VII's coverage of the harassment gay and lesbian employees experience in the workplace, discrimination and harassment based purely upon a person's sexual orientation is not actionable.[78] For example, if employees were simply verbally harassed on the basis of their sexual orientation, but not sexually

70. 260 F.3d 257 (3rd Cir. 2001).

71. *Id.* at 259–60.

72. *Id.* at 265.

73. Rene v. MGM Grand Hotel, 305 F.3d 1061 (9th Cir. 2002) (en banc), *cert. denied*, 535 U.S. 922 (2003).

74. *Id.* at 1063–64.

75. *Id.* at 1068.

76. *See, e.g.*, Jennifer J. Ator, *Same-Sex Sexual Harassment After* Oncale v. Sundowner Offshore Services, Inc.*: Overcoming the History of Judicial Discrimination in Light of the "Common Sense" Standard*, 6 AM. U. J. GENDER SOC. POL'Y & L. 583, 585–86 (1998) (suggesting that gay and lesbian sexual harassment claims may be possible post-*Oncale*).

77. *See, e.g.*, C. Lee Winkelman, Bibby v. Philadelphia Coca-Cola Bottling Co. *and Same-Sex Sexual Harassment In the Workplace: The Third Circuit Forecloses the Possibility of Equal Treatment for Homosexuals Under Title VII*, 55 SMU L. REV. 1825, 1825 (2002) (discussing *Bibby*'s wording as a severe limitation on *Oncale*).

78. *See* Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 82 (1998); Bibby v. Phila. Coca-Cola Bottling Co., 260 F.3d 257, 265 (3rd Cir. 2001).

harassed, they would not have a valid claim under Title VII. Therefore, *Oncale* and *Rene* suggest that in order for harassment of gay and lesbian employees to fall under the purview of Title VII protection on the basis of sex, the harassment must fall under one of *Oncale*'s categories.[79] Several commentators have noted the limitations this formulation creates in many likely scenarios of workplace harassment.[80]

III. TITLE VII, RELIGION, AND SEXUAL ORIENTATION: *PETERSON*'S CONVERGENCE

Prior Title VII jurisprudence exposes some stark inconsistencies in *Peterson*. The first inconsistency relates to the potential of a religious harassment claim. As in *Chalmers* and *Wilson*,[81] the court in *Peterson* was quick to point out a difficulty accommodating Peterson's religious beliefs—the possible liability for harassment claims by his co-workers who felt harassed by his proselytizing.[82] The facts of this case demonstrated that since gay and lesbian employees would not have an actionable claim for Peterson's harassment under Title VII for harassment based on sexual orientation, they may have had a claim for religious harassment (assuming of course that Peterson's actions met the threshold requirements for recovery).[83] Although superficially it is logical for the court to protect employers from liability under the very statute for which it seeks compliance, the result is at best counterintuitive and could force employers to scrutinize the possibility that a religious employee's acts constitute harassment. While it seems logical to advocate careful monitoring of potential harassing situations, the spirit of Title VII[84] suggests that the effect of such monitoring should not inequitably bear on harassment that is religious in nature.

The language of *Peterson* suggests that the spirit of Title VII would mandate workplace protection of gay and lesbian employees, despite the failure of Congress or the courts to do so explicitly. The court in *Peterson* legitimizes the employer's interest in eradicating

79. *See Oncale*, 523 U.S. at 80–81.

80. *See* Jeremy S. Barber, Comment, *Re-Orienting Sexual Harassment: Why Federal Legislation is Needed to Cure Same-Sex Sexual Harassment Law*, 52 AM. U. L. REV. 493, 506–07 (2002); Nailah A. Jaffree, Note, *Halfway Out of the Closet:* Oncale*'s Limitations in Protecting Homosexual Victims of Sex Discrimination*, 54 FLA. L. REV. 799, 824 (2002).

81. *See supra* notes 49–61 and accompanying text.

82. *See* Peterson v. Hewlett-Packard Co., 358 F.3d 599, 607–08 (9th Cir. 2004).

83. *Id.*

84. 42 U.S.C. § 2000e-2 (2000).

homophobia from the workplace, stating, "Hewlett-Packard's efforts to eradicate discrimination against homosexuals in its workplace were entirely consistent with the goals and objectives of our civil rights statutes generally."[85]

However, the court's use of this language indicates a particularly compelling irony—it acknowledges that the spirit of Title VII, as manifested in its decision in *Rene*, would extend protection from workplace harassment and discrimination to gay and lesbian people.[86] Nonetheless, in its language, precedent, and in the limitations of Title VII, such protections are not possible. In other words, although Hewlett-Packard's efforts to prevent harassment of its gay employees were protected, those gay employees could not have an actionable claim of harassment on the basis of sexual orientation in their own right.[87]

Altering the fact pattern of *Peterson* illustrates the inconsistency. In the first hypothetical alteration, it is not Peterson, the religious employee, bringing the claim for discrimination on the basis of his religion, but instead a gay employee bringing a claim for religious harassment based on the hostile work environment stemming from Richard Peterson's homophobic actions. In that case, the gay employee could possibly have a Title VII religious harassment or hostile work environment claim because of Peterson's persistent condemnation of his gay and lesbian co-workers in religious terms.[88] Essentially, because Richard Peterson's harassment was based not simply in homophobia but in his religion, that gay employee, assuming Hewlett-Packard had not taken action to remedy the situation, would likely have an actionable claim under Title VII's protection. Indeed, the court's opinion acknowledged Hewlett-Packard's potential liability for such a Title VII claim.[89]

A second hypothetical demonstrates an additional inconsistency. Imagine that Peterson, instead of responding to the diversity campaign with scripture passages, expressed his disapproval of his gay and lesbian co-workers with posters expressing his views in a secular context. Had Peterson simply begun to post visible homophobic

85. *Peterson*, 358 F.3d at 603–04 (citing Nichols v. Azteca Rest. Enter., 256 F.3d 864, 870 (9th Cir. 2001) (gender stereotyping violates Title VII) and Rene v. MGM Grand Hotel, 305 F.3d 1061, 1067 (9th Cir. 2002) (en banc) (Title VII forbids same-sex harassment)).

86. *Id.*

87. *See* Bibby v. Phila. Coca-Cola Bottling Co., 260 F.3d 257, 265 (3rd Cir. 2001).

88. *See* Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1021 (4th Cir. 1996).

89. *See Peterson*, 358 F.3d at 608.

statements in his cubicle or to persistently use epithets towards his gay and lesbian co-workers (without accompanying sexually based harassment or gender stereotyping comments), those gay and lesbian coworkers would not have an actionable Title VII claim.[90] However, Hewlett-Packard, as articulated in *Peterson*, would certainly have a valid interest in eradicating the harassment and disciplining the offending employee.[91] Unfortunately, if this scenario were to exist in a different workplace, where management failed to defend its gay and lesbian employees (or indeed, as could be the case in some workplaces, encouraged such harassment), then those employees would have no Title VII action.[92]

The silent gay parties in *Peterson* illuminate not only the inconsistencies within Title VII harassment jurisprudence but, more importantly, the interesting interplay between those inconsistencies. In the case of religious employees who attempt to proselytize at work, various federal courts have consistently limited such employees' ability to do so and thus have enabled employers to provide a work environment which is free from harassment[93]—both to avoid a Title VII action by a non-religious employee and to promote a positive, productive work environment.[94] However, as *Peterson* suggests, the scrutiny under which religiously based harassment is analyzed is greater than the scrutiny of harassment that is not religiously based.

If an employee creates a hostile work environment for a co-worker who does not fall under one of Title VII's protected classes, the co-workers affected by that behavior do not have an actionable claim under federal law. Again, an employee could have a possible claim against Hewlett-Packard if Peterson's actions created a hostile work environment, but not if similar actions were not religiously based. This discrepancy has a particular impact on those employees who are harassed on the basis of their sexual orientation, because those employees are one of the very few "discrete and insular

90. *See Bibby*, 260 F.3d at 265.

91. *See Peterson*, 358 F.3d at 608.

92. The Human Rights Campaign, a national political action committee representing the lesbian, gay, bisexual, and transgender community through legislative and community advocacy, collected hundreds of stories from people who had experienced harassment and discrimination at their workplace because of their sexual orientation. *See* DOCUMENTING DISCRIMINATION, *supra* note 1, at 8–37. These stories articulate employees' experiences of assault, physical threats, constant epithets, and discharge simply on the basis of sexual orientation. *Id.*

93. *See supra* notes 49–61 and accompanying text.

94. *See supra* notes 49–61 and accompanying text.

minorities"[95] ignored by Title VII.

Likewise, *Peterson* exposes a circumstance in which a gay or lesbian employee could experience discriminatory harassment or hostile work environment as a result of actions similar to Peterson's, but would have no Title VII recourse. This leaves gay and lesbian employees at the mercy of sensitive and conscientious employers, though many gay and lesbian employees are not so favorably employed.[96] This dichotomy is problematic given the efforts of Title VII to allow individual employees to assert their rights within the workplace[97]—an employer has an acknowledged and protected legal interest in promoting a safe work environment for its gay and lesbian employees, but those employees have no recourse with which to advocate for such an environment on their own.

Concedely, this apparent inconsistency, in large part, is the result of the interaction between employment law and Title VII in general. Title VII functions to protect workers in an employment-at-will context, and it stands to reason that courts would place priority on an employer's freedom to monitor the conduct of its own workplace. It also comports with statutory logic that courts will guard employers from conflicting risks of liability under Title VII. Nonetheless, despite the immediate jurisprudential logic, the tension described in this Recent Development remains important and worthy of further exploration. It also demands an analysis of the conflicting interests of employers and employees, and suggests the need to carve out real protections for employees from harassment which comport with the spirit of Title VII.

It is also important to concede that judges are loath to recognize a particular group for Title VII protection if such protection is not explicit in the statutory language.[98] As such, ideally, legislative action would add sexual orientation to the protected categories of Title VII. As the court in *Peterson* intimated, the spirit, if not the language of Title VII, compels protection of employees from harassment resulting in a hostile work environment. Indeed, many have advocated for

95. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1937).

96. *See supra* note 92.

97. *See* 42 U.S.C. § 2000e-2 (2000); Adams v. U.S. Employment Opportunity Comm'n, 932 F. Supp. 660, 664 (E.D. Pa. 1996) ("Title VII was designed to eradicate unlawful discrimination, and the private right of action against an employer was intended to provide a remedy for such discrimination.").

98. *See, e.g.*, Bibby v. Phila. Coca-Cola Bottling Co., 260 F.3d 257, 265 (3d. Cir. 2001) ("Harassment on the basis of sexual orientation has no place in our society. Congress has not yet seen fit, however, to provide protection against such harassment." (internal citations omitted)).

such explicit protection.[99] Even without explicit statutory language, however, judges could also carve out a broader interpretation of "discrimination on the basis of sex" to include discrimination on the basis of sexual orientation. If courts consider that all gay and lesbian people regardless of their physical presentation do in fact violate societal gender roles, it is fair to consider any harassment of people on the basis of sexual orientation to fall within the purview of *Oncale*'s sex stereotyping category.[100] However, despite efforts by litigators to suggest an interpretation of the statute to that effect, courts have yet to hold as such.[101]

These solutions still leave open the broader question of the court's heightened scrutiny of religiously based harassment. Professor David Yamada has suggested a ubiquitous claim for hostile work environment as a solution to this problem.[102] Although beyond the scope of this Recent Development, this approach remains an important consideration in the development of employment law, and *Peterson* suggests a particularly salient angle from which to analyze how the law regulates harassment within the workplace. Gay and lesbian people are not the only group of people subject to severe workplace harassment, yet the claims that individuals may bring when they work in a hostile environment are extremely limited. Many workplace scenarios suggest the need for a broader and more comprehensive remedy for the problem of workplace harassment. While explicitly seeking to diminish the import of Title VII's attempt to name and remedy discrimination in the workplace on the basis of race, sex, national origin, or religion, this Recent Development proposes an analysis of Title VII harassment jurisprudence as separate from its discrimination jurisprudence in order to encourage a rethinking of the type of work environment realities implicitly condoned by federal employment law. As a result of this exercise in statutory logic, it encourages a rethinking of Title VII protection so as

99. *See, e.g.*, Theodore A. Schroeder, *Fables of the Deconstruction: The Practical Failures of Gay and Lesbian Theory in the Realm of Employment Discrimination*, 6 AM. U. J. GENDER SOC. POL'Y & L. 333, 366–67 (1998) (advocating for the addition of sexual orientation as a protected class under Title VII).

100. *See, e.g.*, Matthew Clark, Comment, *Stating a Title VII Claim for Sexual Orientation Discrimination in the Workplace: The Legal Theories Available After* Rene v. MGM Grand Hotel, 51 UCLA L. REV. 313, 330–31 (2003) (arguing that discrimination based upon sexual orientation is actionable under Title VII if associative theory is available to sexual discrimination plaintiffs).

101. *See supra* notes 70–80 and accompanying text.

102. *See, e.g.*, Yamada, *supra* note 12, at 523 (arguing for the use of a status blind proscription against employee harassment to ensure at least a minimal level of dignity in the workplace).

explicitly to protect gay and lesbian employees, and to address workplace harassment in a holistic way that seeks to avoid the lack of redress for employees who must work in a hostile work environment.

CONCLUSION

On its facts, *Peterson v. Hewlett-Packard* was a victory for the interests of tolerance within the workplace. The decision showed the court's willingness to recognize the importance of having a work environment that is safe for all employees, and to find that religious beliefs cannot trump that interest. Nonetheless, considering this case within the context of the larger body of Title VII jurisprudence exposes problematic inconsistencies in the scope of its protection and in its application to workplace harassment. Title VII therefore inadequately addresses the broader problem of discrimination against gay and lesbian employees in particular and workplace harassment in general. The jurisprudential development that this case will facilitate demands our attention and suggests that a reevaluation of the language of Title VII and the conclusions of its application is necessary.

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